

**Letter of Findings: 04-20120301
Sales and Use Tax
For the Years 2008, 2009, 2010**

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ISSUES

I. Sales and Use Tax – Imposition, Exemption, Exclusion.

Authority: IC § 6-8.1-5-1; IC § 6-2.5-2-1; IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-5-8; Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dep't of State Revenue v. RCA Corp., 310 N.E.2d 96 (Ind. Ct. App. 1974); Indiana Dep't. of Revenue v. Interstate Warehousing, 783 N.E.2d 248 (Ind. 2003); Sales Tax Information Bulletin 8 (May 2002); Brambles Industries, Inc. vs. Indiana Dep't of State Revenue, 892 N.E.2d 1287 (Ind. Tax Ct. 2008); Miles, Inc. v. Indiana Dep't of State Revenue, 659 N.E. 2d 1158 (Ind. Tax Ct. 1995).

Taxpayer protests the imposition of use tax on its purchases of computer discs that contain catalogs of parts and on its purchase of key rings. Taxpayer also protests the assessment of use tax on a vehicle repair transaction that included labor charges.

STATEMENT OF FACTS

Taxpayer is an Indiana retailer that sells several products including tractors and tractor attachments. The Indiana Department of Revenue ("Department") conducted income, withholding and sales and use tax audits of Taxpayer for the years 2008, 2009, and 2010. The sales and use tax audit, which was conducted on a sample and projection basis with Taxpayer's agreement, resulted in the assessment of additional sales and use tax, and interest. The use tax audit examined all of the 2010 purchase invoices and projected those results to the other audited years. Taxpayer protested the use tax assessments on its purchases of: (1) key rings, which Taxpayer argues constitute a "cost of sale" and (2) computer discs that contain parts catalogs ("Parts Catalog CDs" or "CDs"), which Taxpayer argues are a non-taxable service. Taxpayer also protests the assessment of use tax on a vehicle repair transaction. An administrative hearing was held on Taxpayer's protest and this Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales and Use Tax – Imposition, Exemption, Exclusion.

DISCUSSION

The Department's audit found that Taxpayer had made purchases which were subject to sales tax where Taxpayer had failed to pay the sales tax and where Taxpayer had also failed to self-assess and remit use tax. Therefore, the audit assessed the use tax. Specifically, the Department found that Taxpayer purchased key rings and Parts Catalog CDs without paying sales tax. The Department also found, in reviewing Taxpayer's statements, that Taxpayer had not paid sales tax on a vehicle repair transaction which included repair parts. In the absence of the actual invoice detailing the costs of labor and parts, the Department assessed use tax on the cost of the entire transaction.

The notice of proposed assessment is prima facie evidence that the Department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-3-2(a). A person who acquires property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b).

Indiana also imposes a complementary excise tax called "the use tax" on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2(a). Use means the "exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-1(a).

An exemption from the use tax is granted for transactions when sales tax was paid at the time of purchase pursuant to IC § 6-2.5-3-4. There are also additional exemptions from sales tax and use tax. IC § 6-2.5-5 et seq. A statute which provides a tax exemption, however, is strictly construed against the taxpayer. Indiana Dep't of State Revenue v. RCA Corp., 310 N.E.2d 96, 97 (Ind. Ct. App. 1974). When a taxpayer claims it is entitled to a tax exemption, it bears the burden of proving that the terms of the exemption have been met. Indiana Dep't. of Revenue v. Interstate Warehousing, 783 N.E.2d 248, 250 (Ind. 2003). The Department will strictly construe the exemption statutes against the taxpayer claiming the exemption. Id.

A. Parts Catalog CDs.

Taxpayer protests the Department's assessment of use tax on its purchase of computer discs from a vendor, ARI, that contain catalogs of parts ("Parts Catalog CDs" or "CDs") that Taxpayer uses in providing its vehicle repair services. Taxpayer argues that it is purchasing a non-taxable service and not taxable tangible personal property, therefore its purchase of the CD's should not be subject to sales or use tax.

According to ARI, its Parts Catalog CD is a parts lookup product that provides its customers, such as Taxpayer, with current, accurate information relating to parts from close to one hundred manufacturers. The parts information includes descriptions of the parts, code numbers, prices, etc. Information about new parts is added on a regular basis and the information relating to these parts changes frequently requiring regular updates of the Parts Catalog CDs. Taxpayer receives updated CDs on an almost monthly basis, which it uploads into the existing database. Taxpayer explains that without the compilation that ARI provides, Taxpayer would have to acquire this information directly from each of the manufacturers, and either maintain paper records or create its own database and regularly upload updates into their own database. According to ARI's webpage, ARI provides other products including a web-based version of the Parts Catalog CDs Taxpayer purchases.

Taxpayer does not gain exclusive use and right of control of the information compiled by ARI. Also ARI does not collect specific and customized information for Taxpayer.

The issue of whether that "information" is subject to sales and use tax is addressed in the Sales Tax Information Bulletin 8 (May 2002), 25 Ind. Reg. 3934, which states as follows:

The sale of statistical reports, graphs, diagrams or any other information produced or compiled by a computer and sold or reproduced for sale in substantially the same form as it is so produced is considered to be the sale of tangible personal property unless the information from which such reports was compiled was furnished by the same person to whom the finished report is sold.

The vendor-repository, ARI, compiled the information on the parts, put that information on CDs and sold the CDs in the same form as they were produced. Taxpayer did not contract with the vendor to perform and provide a service, such as collecting specific and customized information or compiling Taxpayer's information. Instead, Taxpayer purchased the completed products, the CDs. The CDs consist of information "compiled by a computer [and] sold or reproduced for sale in substantially the same form as it is so produced...." Therefore, CDs constitute "tangible personal property" obtained in a retail transaction and are, therefore, taxable.

Since Taxpayer did not pay sales tax at the time of the purchase of the CDs, use tax is properly imposed.

B. Key Rings.

Taxpayer protests the assessment of use tax on its purchase of key rings. Taxpayer purchased the key rings to replace the "cheap" ones provided by the manufacturers of the equipment Taxpayer sells. Taxpayer argues that the key rings it purchases are therefore a "cost of sale." Taxpayer states that the key rings are not used for promotional purposes. Taxpayer, upon request, provided a sample key ring. The plastic key ring Taxpayer provided has its name, address, and phone number printed on it.

Taxpayer did not provide any legal authority for its "cost of sale" argument. The Indiana sales and use tax code does contain an exemption for items purchased for resale. The resale exemption is stated in IC § 6-2.5-5-8(b):

Transactions involving tangible personal property other than a new motor vehicle are exempt from the state gross retail tax if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of the person's business without changing the form of the property.

The Indiana Tax Court has addressed similar situations. In *Brambles Industries, Inc. vs. Indiana Dep't of State Revenue*, 892 N.E.2d 1287 (Ind. Tax Ct. 2008), where a manufacturer that was seeking the "resale exemption" under IC § 6-2.5-5-8 for pallets by maintaining that "the price of pallet was incorporated into the price of their products" was denied the exemption, the Tax Court explained, as follows:

Indiana Code § 6-2.5-5-8 exempts from tax "[t]ransactions involving tangible personal property... if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of the person's business [.]" Ind. Code Ann. § 6-2.5-5-8(b) (West 2001) (amended 2003). See also 45 Ind. Admin. Code 2.2-5-15(a) (2001). This Court has previously explained that in order to show entitlement to the sale for resale exemption, the taxpayer must demonstrate that it received itemized consideration for the item. See *Miles, Inc. v. Indiana Dep't of State Revenue*, 659 N.E.2d 1158, 1165 (Ind. Tax Ct. 1995) (discount coupons inserted in boxes were not resold because customers did not pay itemized amount for them); *Indiana Bell Tel. Co. v. Indiana Dep't of State Revenue*, 627 N.E.2d 1386, 1389 (Ind. Tax Ct. 1994) (telephone directories, the cost of which was built into customers' monthly bills, were not resold for purposes of the exemption because their cost was not itemized in the bills); *USAir, Inc. v. Indiana Dep't of State Revenue*, 542 N.E.2d 1033, 1035-36 (Ind. Tax Ct. 1989) (holding that meals provided on airline's flights were not resold because there was nothing in the price of the ticket to reflect the price of the food). "Moreover, separate bargaining must occur between the customer and the taxpayer for the exchange of that particular item." *Miles*, 659 N.E.2d at 1165. See also *Greensburg Motel Assocs. v. Indiana Dep't of State Revenue*, 629 N.E.2d 1302, 1305-06 (Ind. Tax Ct. 1994) (holding that consumable and non-consumable items provided in hotel guest rooms were not resold because the hotel's customers did not bargain for those items).

Brambles, 892 N.E.2d. at 1289-90.

In the instant case, Taxpayer is not selling the key rings themselves because there is no itemized consideration for the key rings, nor is there separate bargaining for them.

Neither are the key rings a material part of the items Taxpayer sells. See *Miles, Inc. v. Indiana Dep't of State Revenue*, 659 N.E. 2d 1158, 1164 (Ind. Tax Ct. 1995) (explaining that while each chemical or ingredient in the Alka-Seltzer is a "material part" of or essential to the product, the coupons that are inserted into the packaging are not a "material part" of or essential to the product because the coupons do not impact the product's effectiveness and have an undertaking that is vastly different from the products "task of alleviating physical maladies.")

Based on the above, the purchase and use of the key rings does not qualify for exemption from sales or use tax. Since Taxpayer did not pay sales tax at the time of the purchase of the key rings, use tax is properly imposed.

C. Labor Charges.

Taxpayer protested the Department's assessment of use tax on the entire amount of a vehicle repair transaction. The Department found, in reviewing Taxpayer's statements, that Taxpayer had not paid sales tax on a vehicle repair transaction worth \$2,370.45 which the Department assumed included repair parts. In the absence of the actual invoice detailing the costs of labor and parts, the Department assessed use tax on the cost of the entire transaction.

Before the hearing, Taxpayer provided a copy of the missing invoice which demonstrated that charges for labor and parts were separately stated on the invoice. Taxpayer is correct that the labor charges, as service charges, are not subject to sales or use tax.

The invoice Taxpayer presented includes a "SALES TAX OR TAX ID" line with a zero dollars entry. The invoice also includes a "total due" line that states: "TOTAL DUE (includes Tax plus Shop Supplies)" with the amount of \$2,370.45. Pursuant to IC § 6-2.5-2-1(b), sales tax must be stated separately. The fact that the invoice form states that the total amount due includes sales tax does not qualify as a separate statement of the sales tax due. As a matter of fact, the invoice's "sales tax" line shows zero dollars. Taxpayer, therefore, cannot be presumed to have paid any sales tax on this transaction.

Having not paid sales tax on the tangible personal property conveyed in the transaction, Taxpayer owes sales tax on those parts. This amount is \$2,370.45, the total due, minus the cost of labor, which the invoice shows as \$646. A supplemental review by audit will adjust the amount of tax due for this transaction accordingly.

FINDING

Taxpayer's protest is denied in part and sustained in part.

Taxpayer is denied on its protest of the assessment of tax on the CDs and the key rings, discussed under parts A and B respectively. Taxpayer is sustained on its protest of the assessment of tax on labor charges, as discussed under part C.

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